Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

DAVID ISADOR PORT,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER TRIAL COUNSEL'S UNILATERAL DECISION TO ABANDON PETITIONER'S ONLY VIABLE DEFENSE AT THE GUILT/INNOCENCE STAGE OF THE TRIAL AND THE PUNISHMENT STAGE OF THE TRIAL VIOLATED PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PUNISHMENT STAGES OF HIS TRIAL?

INTERESTED PARTIES

1. David Isador Port, Petitioner.
2. John B. Holmes, Jr., Harris County District Attorney, Houston, Texas, Respondent.

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OPINIONS BELOW

Petitioner was indicted on September 28, 1984, for the murder of Debora Schatz. Petitioner was convicted of the offense in March 1995, and a jury assessed his punishment at 75 years confinement in the Texas Department of Corrections. Petitioner timely appealed his conviction to the Texas Court of Appeals. The Texas Court of Appeals initially reversed Petitioner's conviction due to the improper admission of certain inculpatory statements made by Petitioner. *Port v. State*, 736 S.W.2d 865, 866-68 (Tex. App. – Austin 1987). In light of new authority from the Texas Court of Criminal Appeals bearing on the admissibility of Petitioner's oral statements, the Court of Appeals modified its opinion on rehearing. *Port v. State*, 738 S.W.2d 787 (Tex. App. – Austin 1987). In spite of the new authority, the Court of Appeals' ultimate position that Petitioner's oral statements were inadmissible remained unchanged. *Id.* at 791.

The Texas Court of Criminal Appeals granted the State's petition for discretionary review. On petition for discretionary review, the Court of Criminal Appeals held that the oral statements were properly admissible under Article 38.22, Texas Code of Criminal Procedure. Accordingly, the Court of Criminal Appeals reversed the decision of the Court of Appeals and remanded the case to the Court of Appeals for resolution of previously unaddressed points of error contained in Petitioner's appellate brief. *Port v. State*, 791 S.W.2d 103 (Tex. Crim. App. 1990). On remand, the Court of Appeals affirmed the conviction. *Port v. State*, 798 S.W.2d 839 (Tex. App. – Austin 1990).

On March 26, 1997, Petitioner filed his first and only state application for writ of habeas corpus in the trial court, the 207th Judicial District Court of Comal County, Texas, presided over by the Honorable Judge Jack Robison. Petitioner raised, inter alia, the claim that his trial counsel was ineffective for failing to investigate and present the only viable defense at the guilt/innocence stage of the trial and at punishment. A hearing was held on those claims by the trial court on August 28-29, 1997. Petitioner and the State submitted Proposed Findings of Fact and Conclusions of Law to the trial court based on the record and the hearing testimony. The trial court adopted the State's Proposed Findings and Conclusions, by signing them on June 3, 1998, and sent the case up to the Court of Criminal Appeals. On September 16, 1998, the Court of Criminal Appeals issued a "white card"[1] denial of relief, which was postmarked and mailed to the undersigned on September 23, 1998. *See* **Exhibit A**.

JURISDICTION

The Texas Court of Criminal Appeals had jurisdiction under Article 11.07, TEX. CODE OF CRIM. PROC. This Court has certiorari jurisdiction under 28 U.S.C. § 1257 (1998).

[1] A postcard was mailed to the undersigned stating, in full: "This is to advise that the Court has denied [sic] without written order on the findings of the trial court after a hearing [sic] the application for writ of habeas corpus."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

Amendment XIV

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner's trial counsel, Mr. Jack Zimmermann, was retained on or about June 8, 1984, shortly after Petitioner was arrested. When he was retained, he was immediately apprised of Petitioner's medical condition: Petitioner was (and still is) a diabetic. Mr. Zimmermann immediately retained an expert, Dr. Milton Altschuler, who examined Petitioner, and who reported to trial counsel that in his opinion, Petitioner was in a hypoglycemic state on the day of the murder.

The fact that Petitioner was a diabetic was actually known to the police even before Mr. Zimmermann was retained. Indeed, during the morning of June 8, 1984, at some point prior to 10:30 to 11:00 a.m., 5 S.F. 45, Bernard Port notified Sgt. David Collier of the Houston Police Department that Port's son, Petitioner, was missing and was a diabetic. 5 S.F. 13. Additionally, on the morning of

June 8, 1984, Mrs. Odette Port told Houston Police Department Officer Irma Lares-Sauceda that Petitioner was a diabetic and needed daily injections of insulin. 6 S.F. 187.

When Petitioner was arrested at approximately 2:15 p.m. on June 8, 1984, he was given his *Miranda* warnings by Officer Harris of the Houston Police Department. 5 S.F. 130-31. After Petitioner was given his *Miranda* warnings, Houston Police Department Officer Mike Waltmon asked Petitioner if he killed the female postal carrier. Petitioner responded, "Yeah, I shot her." 5 S.F. 134. Officer Waltmon then asked him why he shot her and Petitioner responded, "**I don't know; I had a *seizure* or something.**" 5 S.F. 135. Waltmon, who already knew that Petitioner was a diabetic, asked Petitioner if he had taken his dosage of insulin for that day and Petitioner told him he "had a shot at the house" and that he was okay. 5 S.F. 135, 170-71.

Thus, early on, both sides knew that Petitioner's diabetic condition was a potential issue. It was clearly a potential issue to the State, because: (1) Assistant District Attorney Brad Beers discussed Officer Waltmon's modification of his report (striking out "seizure" and inserting "coma") with Officer Waltmon in September 1984, prior to the grand jury's return of the indictment (as discussed in footnote 2, *supra*); (2) the State attempted to obtain the records of Dr. Milton Altschuler, the defensive expert, on September 28, 1984, which was the date that the grand jury returned the indictment; and (3) the State conducted voir dire examination on the topic of diabetes as a potential defense.

Petitioner's trial counsel did some investigation into the ramifications of Petitioner's diabetic condition, as it impacted upon the events of June 7, 1984. Trial counsel also talked to experts and had them available to present a defense. **However, that defense was never presented due to the unilateral decision of trial counsel.** Petitioner was not allowed any input by his trial counsel as to whether the defense should be presented at the guilt stage. *See* E.H. 319, 322. Furthermore, trial counsel failed to use Petitioner's diabetic condition or hypoglycemia as a mitigating factor at the punishment stage of the trial.

Petitioner's diabetic condition was (and still is) the result of a deficiency of insulin in the body. LEO P. KRALL & RICHARD S. BEASER, JOSLIN DIABETES MANUAL 2 (12th ed. 1989) (hereinafter JOSLIN DIABETES MANUAL). Petitioner is a Type 1 diabetic, which means that Petitioner is dependent upon insulin injections because his body does not produce insulin at all or produces it at a greatly reduced level. *Id.* at 15. An acute complication of diabetes is a hypoglycemic reaction which occurs when there is too little glucose in the body. *See* I.J. Deary, *Effects Of Hypoglycemia On Cognitive Function, in* HYPOGLYCEMIA AND DIABETES 80 (Brian Frier & Miles Fisher eds., 1993). Typically this reaction occurs when the diabetic has taken too much insulin, has eaten too little, exercised too much, or some combination of these factors. JOSLIN DIABETES MANUAL, *supra*, at 247. A wide variety of mental changes are displayed during hypoglycemia, ranging from mild anxiety or exhilaration to severe psychotic states. David Adlersberg & Henry Dolger, *Medico-Legal Problems Of Hypoglycemic Reactions In Diabetes* 12 ANNALS OF INTERNAL MEDICINE 1804, 1805 (1939). According to Krall and Beaser,

"In some people, hypoglycemia can cause a Jekyll-and-Hyde effect. The quiet person may become belligerent, or the lively person somber." JOSLIN DIABETES MANUAL, *supra*, at 249. Furthermore, the details of events occurring during hypoglycemic attacks – about which the sufferer may be amnesiac – may subsequently be recalled during other hypoglycemic episodes or merely after a restorative meal. Joseph Wilder, *Problems of Criminal Psychology Related to Hypoglycemic States*, 1 JOURNAL OF CRIMINAL PSYCHOPATHOLOGY 219, 227 (Jan. 1940).

Striking acts of violence and aggressiveness can occur during a state of hypoglycemia. For example, Adlersberg and Dolger describe one of their patients as a devoted mother who, while in a hypoglycemic state, stuck a pin in her infant son's eye several times, then abused and strangled him until her family intervened to save the child. Adlersberg & Dolger, *supra*, at 1807; *see also* Diana Brahams, *Hypoglycemia and Intent*, 337 THE LANCET 1030 (April 27, 1991) (reporting appellate reversal for trial court refusal to allow hypoglycemia defense in assault case). In the British case of *Regina v. Quick*, the Court held that the defense of automatism[2] was available

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[2] The British "defense" of automatism relates to the same concern as TEX. PENAL CODE, § 6.01(a): that an offense must be voluntary. "[T]he accused has a defence known as automatism if he can show that at the relevant time he was in such a condition that he could not be said to have been acting (or acting in a voluntary manner) at all. It is not clear whether the defence of automatism negatives the *mens rea* or the *actus reus* aspects of the offence but it is clear that where the defence is raised successfully no criminal responsibility exists and will result in an outright acquittal of the accused." Gerry Maher, Judith Pearson, & Brian M. Frier, *Diabetes Mellitus and Criminal*

to a hypoglycemic defendant who had taken his insulin shot, but had consumed only a cup of tea, before assaulting the rival for his girlfriend's affections with an iron bar. 1973 Q.B. 910 (Eng. C.A.).[3]

Petitioner's trial counsel failed to adduce, during either stage of the trial, any meaningful evidence of Petitioner's diabetes and, more importantly, evidence of hypoglycemia that occurred on June 7, 1984. Throughout a pretrial suppression hearing, the State made efforts to undercut any possible defense premised upon Petitioner's diabetic condition. *See e.g.*, 5 S.F. 98-99, 134-35; 6 S.F. 187-88, 214-16, 241, 264-65. During the cross-examination of the State's witnesses in the suppression hearing, trial counsel did not even attempt to explore the issue of Petitioner's diabetes and his condition on the day of the death of Schatz or on the following day when he made extensive oral statements after his arrest. During the guilt stage of the trial, trial counsel mentioned that Petitioner had suffered from diabetes since childhood. However, no attempt was made to utilize hypoglycemia to show Petitioner's alleged acts would have been involuntary or to

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Responsibility, 24-2 MED. SCI. LAW 95, 95 (1984); *see also Paredes v. State*, 500 S.W.2d 160 (Tex. Crim. App. 1973) (recognizing an affirmative defense of "diabetes"); *Loftin v. State*, 366 S.W.2d 940 (Tex. Crim. App. 1963) (recognizing entitlement to instruction on diabetes).

[3] Hill and Sargant also describe the case of a young man who was suffering from hypoglycemia when he killed his mother by stabbing her with a kitchen knife. Dennis Hill & William Sargant, *A Case of Matricide*, 244 THE LANCET 526 (Apr. 24, 1943). Brahams, *supra*, reports a 1991 case of repeated hammer attack by a man on his spouse under a possible hypoglycemic rage.

disprove the mental state required for the charged offense of murder. At the punishment stage of the trial, trial counsel elicited from the two defense witnesses that Petitioner had diabetes. 14 S.F. 8, 13, 18, 25-27. On cross-examination, the prosecutor took the offensive and, appearing more knowledgeable on the subject of diabetes than trial counsel, successfully deflated the issue. *Id.* at 31-33. Trial counsel's very brief final argument at punishment, which amounted to no more than a plea for mercy, was wholly unrelated to diabetes or hypoglycemia. 14 S.F. 51. Throughout the trial, the State seemed far more concerned with the issue of diabetes. In fact, the State urged the jury not to consider Petitioner's diabetes to be a mitigating factor. 14 S.F. 71.

SUMMARY OF THE ARGUMENT

Petitioner had only one true, viable factual defense at guilt/innocence and at punishment: that his conduct was the result of hypoglycemia. Petitioner's trial counsel failed to fully investigate and made a unilateral decision not to present that defense at either stage of the trial, electing instead to argue that Roger Port, Petitioner's brother, might have been the murderer, even though he knew that such a defense was untrue and not viable. At punishment, Petitioner's trial counsel repeated the error of his way by again failing to present evidence of the hypoglycemia. The failure to fully investigate and present the true defense, indeed, the only viable defense, constitutes ineffective assistance of counsel. Moreover, the trial court's findings of fact and the "white card" affirmance by the Texas Court of Criminal Appeals conflict with the

Eleventh Circuit's opinion in *Collier v. Turpin*, 155 F.3d 1277, 1998 WL 646744 (11th Cir. Sept. 21, 1998).

REASONS FOR GRANTING THE PETITION

The Sixth Amendment to the Constitution of the United States, as applicable to Texas via the Fourteenth Amendment, requires that a criminal defendant be afforded effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "The right to effective assistance," the Supreme Court noted in *Cronic*, "is the right to require the prosecution's case to survive the crucible of meaningful adversary testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984); *Collier v. Turpin*, 155 F.3d 1277, 1998 WL 646744 (11th Cir. Sept. 21, 1998) (holding that failure to put on punishment evidence of petitioner's hypoglycemic state at the time of offense precipitated a "breakdown in the adversarial process"). Ineffective assistance of counsel mandates reversal of a conviction. *Stone v. Powell*, 428 U.S. 465, 497 (1976). To demonstrate ineffective assistance of counsel, a defendant must show that: (1) trial counsel was deficient; and (2) the defendant was prejudiced by his counsel's performance. *Strickland*, 466 U.S. at 688-92. Under the *Strickland* performance prong, the proper standard for measuring attorney performance is that of reasonably effective assistance as guided by prevailing professional norms. *Strickland*, 466 U.S. at 687-88. "The question of whether a decision by counsel was a tactical one is a question of fact." *Collier*, 1998 WL 646744, at *13 (citations omitted). "Whether the tactic was reasonable, however, is a question of law and is reviewed de novo." *Id.* (citation omitted). Prejudice is

shown if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A " 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*

A. DEFICIENT PERFORMANCE OF TRIAL COUNSEL.

As a first step in avoiding deficient performance, trial counsel must acquaint himself with the law and facts of the case. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. A "strategic choice" made after either no legal or no factual investigation, or after the point in time in a trial in which the reasonable choice could have been made, is not a strategic choice at all, but a situation more akin to complete deprivation of counsel, a breakdown in the adversarial system.

Trial counsel failed to provide acceptable performance because he did not make a reasonable investigation of the law and facts in this case. Counsel did investigate Petitioner's diabetic condition. However, he did not research the law on how that evidence could be used at trial. Trial counsel's files were devoid of legal authority relating to the use of hypoglycemia such as those cases cited herein. Nor was there research or legal memoranda on analogous topics relating to, for example, mental capacity to form the requisite mental state to commit murder. Trial counsel did prepare a proposed

jury instruction on voluntariness, which indicates he might have been aware that he could introduce hypoglycemia as an element of Petitioner's defense, but he abandoned such an approach, failing to submit both the evidence and the instruction.

Trial counsel's decision to forego legal research related to Petitioner's condition defies any reasonable professional judgment. *Strickland*, 466 U.S. at 690-91. Research into the law as well as the facts is necessary to make an intelligent tactical decision whether or not to pursue a certain line of defense. Trial counsel's abandonment of any defense based upon Petitioner's mental state was not an informed strategic choice, because he made no effort to educate himself concerning possible legal defenses based upon hypoglycemic states. Failure to research, in itself, was deficient performance exacerbated by the fact that such research, had it been performed, would have disclosed viable legal defenses, whereas trial counsel otherwise had none. *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990); *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987). At the state writ hearing, trial counsel alleged that he was planning to use the hypoglycemia defense on the basis of certain contingencies. If counsel made the choices he alleges, they were not informed strategic choices, and they were made well after counsel had elicited testimony, impossibly suggesting an alternative suspect that, by trial counsel's present accounting, foreclosed the opportunity for him to introduce the hypoglycemia evidence at the punishment stage.[4]

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[4] On March 9, 1995, three or four days before the time that Mr. Zimmermann has alleged that he had sufficient information

B. GUILT STAGE INEFFECTIVENESS.

Hypoglycemia could certainly have been used to establish valid defenses to the charge of murder. Trial counsel could have alleged without admitting guilt that, due to insulin shock, Petitioner's actions were not "voluntary acts," as required for any level of criminal culpability under TEX. PENAL CODE, § 6.01(a).[5] Also without

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on the law to make his decision not to put on the hypoglycemia defense, Mr. Zimmermann elicited testimony from Officer Collier that committed Petitioner before the jury to the theory that someone else committed the crime. Mr. Zimmermann has testified that, because of this suggestion to the jury that there was an alternative suspect, he decided not to put on evidence of hypoglycemia at the punishment stage, fearing a backlash from the jury for putting on an (inauthentic) alternative suspect "defense" at the guilt/innocence stage.

The alternative suspect "defense" was objectively unprofessional. Zimmermann provided ineffective assistance of counsel by trying to create suspicion, on the basis of zero factual support, that Petitioner's brother committed the crime. He compounded that error – which cost him credibility with the jury – by cornering himself with that testimony into a situation in which he did not feel like he could put on the only real (hypoglycemia) defense at guilt or punishment.

[5] Section 6.01(a) provides:

> A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.

Voluntary conduct is thus a presumed element of every offense codified in the Texas Penal Code. In order for a conviction to withstand constitutional scrutiny, a defendant must necessarily be convicted of every element of an offense beyond a reasonable doubt. The fact that insulin shock was never raised to demonstrate that Applicant's alleged actions were involuntary raises constitutional questions about his conviction.

an admission of guilt, trial counsel could have raised hypoglycemia as evidence that Petitioner did not possess the required mental state for murder. *See People v. Morton*, 498 N.Y.S.2d 874, 876 (N.Y. App. Div. 1986); *see also Collier v. Turpin*, 155 F.3d 1277, 1998 WL 646744 (11th Cir. Sept. 21, 1998) (punishment phase ineffectiveness for failure to raise hypoglycemia as strongest mitigating evidence). Trial counsel's failure to adduce this defensive evidence on behalf of his client rendered his performance deficient.

By way of analogy, Petitioner directs the Court's attention to *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987). In *Profitt*, the Fifth Circuit found that trial counsel was ineffective for failing to raise an insanity defense. *Id.* at 1248-50. In attempting to determine whether trial counsel in *Profitt* should have presented an insanity defense the Fifth Circuit proposed a three part inquiry finding performance deficient when counsel:

> (1) makes some exploration of the insanity defense but fails to take an obvious and readily available investigatory step which would have made the defense viable, (2) does not produce reasonable tactical reasons for not pursuing further investigation, and (3) raises no other plausible defense. . . .

Id. at 1248 (citing *Walker v. Mitchell*, 587 F. Supp. 1432, 1443 (E.D. Va. 1984)). Weighing heavily in the Fifth Circuit's finding in *Profitt* that there was deficient performance was the fact that trial counsel's investigative neglect and spur-of-the-moment abandonment of a mental state defense posing the only reasonable defensive strategy left "the client totally defenseless." *Id.* at 1249.

In precisely the same manner as in *Profitt*, Petitioner's trial counsel decided to forego presenting Petitioner's hypoglycemia as a defense. Trial counsel did conduct some preliminary exploration of the issue, with **very positive results**, when Dr. Altschuler's report clearly supported the presentation of the defense. Trial counsel conferred with an additional expert, Dr. Fields, and the notes of that conversation again support the proposition that the defense was viable. Instead of researching the matter and developing and presenting a coherent legal and factual defense, trial counsel abruptly changed course in the midst of trial, on March 9, 1985, and proceeded on the totally implausible theory that someone else (Roger Port) shot the deceased. This approach, derided by the State in closing argument as a "phantom murderer" theory (13 S.F. 1504), was illogical, not only because of inculpatory statements made by Petitioner that were admitted at his trial, but also because of the prodigious amount of circumstantial evidence corroborating those statements and linking Petitioner to the crime. Hypoglycemia, on the other hand – like the insanity issue in *Profitt* – was the only viable, believable, factual defensive evidence that could have been mustered to combat the offense charged.

There is a reasonable probability that, but for trial counsel's failure to investigate and present a defense based upon evidence of Petitioner's hypoglycemic state at the time of the offense, the result of Petitioner's guilt stage would have been different in that Petitioner would have been convicted of a lesser included offense, if not absolved of guilt. *Strickland*, 466 U.S. at 694. The State presented nothing tending to cast in any different light

the clear picture conveyed by the totality of evidence at trial that David Port was a decent, law-abiding youth who, for no ascertainable motive, might have snapped and committed a horrible act. The State is not required to prove motive, and offered no testimony or even convincing cross-examination to counter defense witnesses' favorable opinion of Petitioner and evidence of his good reputation. 13 S.F. 1361-62, 1364, 1372-74 (guilt stage testimony of Michael Buckingham); 13 S.F. 1377-82 (guilt stage testimony of Ann Buckingham). In light of the uncontrovertible evidence of good reputation, the jury had to be very puzzled at the close of the guilt stage testimony by the facts of the offense: an unfathomable and tragic burst of deadly behavior unquestionably perpetrated by Petitioner.

Had trial counsel proceeded at the guilt stage with evidence showing that Petitioner was in a hypoglycemic state at the time of the alleged acts, the jury's puzzlement would have been assuaged, with the likely outcome that the jury would have acquitted Petitioner or convicted him of a lesser included offense. At the time of the offense, when the defense raised sufficient evidence of involuntariness, Texas courts were required to instruct the jury that "a defendant should be acquitted if there is a reasonable doubt as to whether he voluntarily engaged in the conduct of which he is accused." *Williams v. State*, 630 S.W.2d 640, 644 (Tex. Crim. App. 1982); *Webb*, 747 F.2d at 283-84. If a homicide was found by the jury not to be "the result of voluntary conduct, it [could] not be criminally punished." *Webb*, 747 F.2d at 283. Evidence of Petitioner's hypoglycemic state would have been admissible not only to disprove voluntariness, but to undermine the State's

proof of essential elements of the offense with evidence of diminished capacity. *Penry v. State*, 903 S.W.2d 715, 769 n.1 (Tex. Crim. App. 1995) (Maloney, J., concurring). Petitioner's hypoglycemic rage could have been marshalled to demonstrate absence of the *mens rea* the State had the burden to prove without raising the affirmative defense of insanity. *Id.* Diminished capacity simply negates the required state of mind that must be proven as an element of the offense charged. *Id.* at 769 n.3.

At the time of trial, Texas recognized a defendant's right to raise diminished capacity in order to negate the mental state element in "specific intent" crimes. *Cowles v. State*, 510 S.W.2d 608, 610 (Tex. Crim. App. 1974); *see Penry*, 903 S.W.2d at 768 (Maloney, J., concurring). The trial court would have been required under *Cowles* to admit Petitioner's evidence of hypoglycemia as proof of diminished capacity, because Petitioner's indictment and charge required a finding of specific intent. The State, at a minimum, was required under Section 19.02(a)(2), Texas Penal Code (1983), to prove beyond a reasonable doubt certain specific intents: intention to cause serious bodily injury and intentional and knowing commission of an act clearly dangerous to human life. Thus, as with proof of involuntariness, trial counsel faced no bar to introduction of the evidence of hypoglycemia for the purpose of demonstrating diminished capacity. His omission to do so was highly prejudicial. Several federal and state courts have held that refusal by a trial court to admit such evidence "downgrades the prosecution's burden to something less than that mandated by due process of law." *Id.* (quoting *Hendershott v. People*, 653 P.2d 385, 390-93 (Colo. 1982), *cert. denied*, 459 U.S. 1225 (1983), and also citing

two other cases). Under such a view, trial counsel's error in omitting to raise the defense prejudiced Petitioner by denying him a fundamentally fair trial.

Trial counsel's proof of hypoglycemia would have allowed him to obtain jury charges on at least two lesser included offenses having mental state requirements of lesser culpability than that of murder: involuntary manslaughter and criminally negligent homicide. *Lugo v. State*, 667 S.W.2d 144, 147 (Tex. Crim. App. 1984).

Given Petitioner's unimpeached reputation for nonviolence, the otherwise bizarre circumstances of the crime, the opinion of experts that Petitioner suffered from hypoglycemia at the time of the crime, and the lack of any other plausible defense, there is a reasonable probability that, had trial counsel introduced the evidence of hypoglycemia and secured the proper jury charges, Petitioner would have been acquitted or convicted of a lesser offense.

C. PUNISHMENT STAGE INEFFECTIVENESS.

At the absolute minimum, the fact that Petitioner suffered a diabetic-based rage at the time when the State alleged he committed the offense was mitigating evidence that would have explained the conduct to the jury. Trial counsel failed to present hypoglycemia as mitigating evidence with respect to the punishment phase of Petitioner's trial. This omission is unfathomable and amounts to ineffective assistance of counsel under the Sixth Amendment. *Collier v. Turpin*, 155 F.3d 1277, 1998 WL 646744 (11th Cir. Sept. 21, 1998) (granting punishment

stage relief in capital case because trial counsel was ineffective for failing to produce evidence of hypoglycemia at the time of the offense for the purpose of mitigation). The failure to present hypoglycemia as mitigating evidence constituted deficient performance under the Sixth Amendment and resulted in a significantly harsher punishment. *Spriggs v. Collins*, 993 F.2d 85, 88-89 (5th Cir. 1993) (applying *Strickland* to non-capital punishment phase).

Without doubt, the proof that Petitioner was under the effects of hypoglycemia at the time of the alleged offense was mitigating evidence that would have provided the jury with a contributing cause of the otherwise random and aberrant act of violence. In *Collier, supra*, the Eleventh Circuit recently vacated a petitioner's death sentence because trial counsel failed to secure expert testimony at the punishment stage that would have explained the effect of the petitioner's diabetes on his ability to control his behavior on the day of the crimes. *Collier*, 1998 WL 646744, at *21. The petitioner in *Collier*, like Petitioner, had an otherwise unimpeachable background, which the Eleventh Circuit also concluded had not received enough development at the penalty stage. *Id.* At the federal district court, Collier's expert on diabetes testified that, in his opinion, Collier "was suffering from acute hypoglycemia when he committed the crimes in this case." *Id.* at *15.[6] The Eleventh Circuit premised its

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[6] The opinion of Collier's expert, Dr. Buris Boshell, validates the credibility of Petitioner's experts, Drs. Altschuler and Leiser, on the material issues in the instant case. Among other considerations, the facts of Collier's offense demonstrate a

finding that Collier's trial counsel should have pursued expert testimony on Collier's hypoglycemia on a number of factors very comparable to Petitioner's case. *Id.* (noting especially that the defense "likely would have constituted [the] strongest evidence mitigating the crimes [the defendant] committed"). The Eleventh Circuit concluded that, by failing to put on sufficient evidence to show the jury the "stark contrast" between Collier's acts on the day of the offense and his background, and by failing to explain this contrast with expert testimony on Collier's hypoglycemia at the time of the offense, "Collier's counsel precipitated a 'breakdown in the adversarial process.' " *Id.* at *20, *21.

Petitioner's counsel, likewise, undermined Petitioner's case for mitigation at punishment by failing to produce the testimony of Altschuler and Fields, **the strongest evidence mitigating the offense** for which Petitioner was convicted. Prejudice under *Spriggs* is apparent. The jury sentenced Petitioner to a term of incarceration of seventy-five years and a fine of $10,000. The statutory maximum was ninety-nine years or life and a fine of up to $10,000. The statutory minimum was five years probation. Petitioner had no prior criminal record whatsoever! The sentence imposed by the jury was thus very severe. It was precisely what the State asked the jury to impose. Even so, with the dearth of evidence at the punishment

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great deal more apparent purposefulness than Petitioner's. Yet, in Boshell's opinion, Collier was in a hypoglycemic state for the entire criminal episode, including the robbery of the store, flight, apprehension, struggle, appropriation of the weapon, assault by **repetitive, very accurate gunfire at two different victims**, and flight.

stage, it took the jury approximately four hours to reach the verdict. A comprehensible explanation of why Petitioner might have committed the crime, as explained by Petitioner's medical condition, would certainly have gone a long way towards influencing, in a favorable manner, the jury's discretion. The fact that Petitioner's hypoglycemia would have made his alleged conduct less purposeful, even if the jury did not believe his mental state was so diminished at the guilt stage as to exculpate him from the offense, certainly would tend to mitigate his sentence.

There is a reasonable probability that but for counsel's unprofessional conduct in not presenting Petitioner's hypoglycemia on June 7, 1984, to the jury, the jury would have assessed a significantly less harsh sentence.

D. NO EVIDENCE OF REASONABLE TRIAL STRATEGY.

In an affidavit dated July 25, 1997, and in his hearing testimony on August 28, 1997 (E.H. at 242), Mr. Zimmermann responded to Petitioner's claims by asserting that he had prepared a pretrial defense strategy that included a "hypoglycemia defense." The alleged strategy was responsive to "two contingencies":

> 1) Mr. Zimmermann stated that, if the court suppressed Petitioner's "one continuous oral confession," he planned to refrain from putting on defensive evidence and to rest behind the State, in reliance upon what he considered an otherwise weak circumstantial evidence case on the part of the State.

> 2) Mr. Zimmermann stated that, if the court did not suppress the oral confession "in its entirety," he would have considered there no longer to have been "any doubt as to the identity of the shooter," and planned to introduce the "weak defense" that Petitioner suffered from a hypoglycemic seizure at the time of the offense which deprived him of any culpable mental state.

Affidavit at 5.

Mr. Zimmermann claimed, however, that he abandoned his resolve to follow through on the second contingency after the trial court admitted only a portion of Petitioner's oral statements to Officer Irma Sauceda identifying himself as the shooter, a contingency he had not planned for. Mr. Zimmermann maintains that, instead of following through on his pretrial strategy, he adopted a new approach in which the above two contingencies were transformed into a new "tough strategy question" whether to:

> 1) attack the perceptive and recording abilities of the police officer who would transmit Petitioner's oral confessions through her testimony, in order to raise a reasonable doubt about the confessions she conveyed, and to further attack the "weak" circumstantial evidence; or,
>
> 2) concede that Petitioner committed the offense by calling Dr. Altschuler to relate Petitioner's statements to him, incriminating himself and presenting the facts necessary to raise a hypoglycemic reaction defense.

Affidavit at 8. Mr. Zimmermann correctly asserted that any error on the part of the trial court in admitting

Petitioner's confessions could have been preserved under either of these approaches at the guilt stage. *Id.*; E.H. at 283, 286, 336. Mr. Zimmermann stated that he and his colleagues decided, however, that "there was a much better chance of an acquittal or hung jury" with the first line of defense, requiring the State to meet its burden of proof through presentation of the oral confessions and circumstantial evidence, than with the second, attacking the State's proof with the "comparatively weak hypoglycemic reaction strategy."[7] Affidavit at 8; E.H. at 339, 340.

Mr. Zimmermann claimed that, after the jury convicted at the guilt/innocence stage of the trial, he did not put on evidence of Petitioner's hypoglycemia at the punishment stage for two reasons:

> 1) the jury would react negatively to an admission by Petitioner at the punishment stage when Petitioner had maintained innocence at the guilt stage; and
>
> 2) Zimmermann believed that Texas law at the time of Petitioner's trial would have required Petitioner to waive appellate error regarding the admission at the guilt stage of his oral confessions if he "admit[ted] he was the shooter at sentencing."

Affidavit at 9.

Mr. Zimmermann made all of these decisions unilaterally and without directly asking Petitioner whether

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[7] As has been noted, *supra*, this would have been tantamount to deciding not to put on any defense at all over putting on a viable defense.

he wanted to pursue the hypoglycemic defense at either stage of the trial. Additionally, his trial file evidences no legal investigation regarding how he might have applied Petitioner's hypoglycemia to defeat the State's proof of the mental element of the offense. E.H. 244. Admitting the absence of any research in his file (E.H. at 290, 296), Mr. Zimmermann represented that he had been prepared to pursue a mental state defense, but had chosen not to take that path for the above reasons. In examining an attorney's actions at trial, reviewing courts give deference to counsel's strategic decisions. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A trial decision is genuinely strategic only when an attorney brings to bear reasonable judgment in evaluating the risks and benefits of the various choices." *Id.* (citing *Chambers v. Armontrout*, 907 F.2d 825, 833 (8th Cir.), *cert. denied*, 498 U.S. 950 (1990)). "Counsel's performance is deficient when it is less competent than the assistance that should be provided by a reasonable attorney under the same circumstances." *Chambers*, 907 F.2d at 828.

Without consulting with Petitioner and seeking his input, and without full legal and factual investigation, Mr. Zimmermann's "strategic choices" at both stages of the trial cannot qualify as "strategic" choices.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF CRIMINAL APPEALS OF TEXAS
[September 16, 1998]

[Post mark Sept. 23, 1998]

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN TEXAS 78711

RE: Writ No. 21,733-02

STYLE: David Isador Port
TRIAL COURT NO: CR85-12B-1

[SEAL] September 16, 1998

This is to advise that the Court has denied without written order on the findings of the trial court after a hearing the application for writ of habeas corpus.

Troy C. Bennett, Jr.

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